No. 82-912

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1982

FEDERAL COMMUNICATIONS COMMISSION,

Appellant

v.

LEAGUE OF WOMEN VOTERS OF
CALIFORNIA, ET AL.,

Appellees

On Appeal from the
United States District Court
for the Central District of California

BRIEF OF AMICUS CURIAE NATIONAL BLACK MEDIA COALITION

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QUESTION PRESENTED

Does the provision of Section 399 of the Communications Act that prohibits editorializing by noncommercial educational broadcasting stations that receive grants from the Corporation for Public Broadcasting (CPB) violate the First Amendment?

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STATEMENT OF THE CASE

Amicus Curiae adopts the Appellee's Statement.

INTEREST OF AMICUS CURIAE

The National Black Media Coalition (NBMC) is a membership organization of individuals and group affiliates around the country who have joined together to assert the needs and interests of America's substantial Black population in legal and policy matters regarding communications. It has appeared in many cases before the Federal Communications Commission (FCC) and the courts to vindicate the public's interest in obtaining maximum diversity of information sources, and to facilitate the expression of minority points of view to mass audiences.

We believe that the interests of the substantial Black population, and of audiences generally, weigh heavily in favor of the lower court's finding that Section 399's ban on certain editorializing is violative of the First Amendment.

SUMMARY OF ARGUMENT

In any balance of First Amendment interests, the public's right to receive access to diverse views and voices is paramount. Where the Government restricts speech, its actions must be narrowly tailored to achieve a compelling governmental interest. In this case, the governmental interests are uncompelling, and the means to achieve its goals are both overly broad and ineffective.

Access to additional editorial voices is particularly important to minority audiences, who are not as well served by commercial radio and television as majority audiences are. Additional voices in the marketplace of ideas -- particularly voices not subject to conventional advertiser pressures -- increase the likelihood that issues of concern to minority audiences will be aired. NBMC urges the Court to weigh

heavily in its balance the audience's paramount First Amendment rights to a free and open marketplace of ideas.

When First Amendment analysis is applied to Section 399, it fails virtually every test. The governmental aims are at best uncompelling, since they are vague, speculative and suspect. The heavy-handed means Congress chose to meet its aims are ineffective and overly broad at the same time. They certainly are not "narrowly tailored." And they are more restrictive of First Amendment rights than other alternatives such as segregating government funds or mandating by law that the content of editorials could not enter into governmental funding decisions. Censorship of important voices should be the last resort to a significant and serious problem, not an easy tool for stifling criticism of the status

quo or opposition to the incumbents' reelection.

Finally, NBMC cautions against a decision in this case that might jeopardize other provisions of the Communications Act relating to public broadcasters. In requiring equal employment opportunities and community advisory boards, Congress is not suppressing speech as it does directly in Section 399. NBMC urges, then, a narrow decision affirming the lower court.

ARGUMENT

I. THE COURT BELOW CORRECTLY FOUND SECTION 399's BAN ON EDITORIALIZING TO BE VIOLATIVE OF THE FIRST AMENDMENT.

A. The First Amendment Rights of the Public, and Particularly Minority Segments, Are Impinged by Government Suppression of the Editorial Voices of Certain Noncommercial Educational Broadcast Stations.

The National Black Media Coalition's starting point in the consideration of First Amendment interests in broadcasting, where there is only a limited number of governmental licenses, is this Court's statement in Associated Press v. United States, 326 U.S. 1, 20 (1945), that the First Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of

the public. . . ."

Consistent with this view, the FCC has adopted many policies and rules aimed at increasing the number of voices available to local audiences over the airwaves. In adopting multiple ownership rules in 1970, for example, the Commission held to the view that "60 different licenses are more desirable than 50, and even that 51 are more desirable than 50." Multiple Ownership, First Report and Order (Dkt. 18110), 22 F.C.C.2d 306, 311 (1970).

This doctrine of diversity is most important to minority audiences. Almost by definition, minority audiences are the last to be served by a system of limited entry and licensing. That is, where there are only a few competing stations in a given market, they are most likely

to serve majority audiences.[1] As more stations enter the market, there is a greater opportunity for and likelihood of programming service aimed at minority audiences. Thus, NBMC has consistently championed laws, rules and policies that open entry into the broadcast marketplace -- new and diverse sources to express divergent viewpoints. Conversely, we oppose efforts to stifle the relatively few voices licensed to operate broadcast stations, at least where such restrictions are not necessary to enhance the opportunities for other, non-licensees to express their opinions over the airwaves.[2]

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[1] See, e.g., Beebe & Owen, "Alternative Structures For Television," (OTP Staff Paper, 1972), reprinted in D. Ginsburg, Regulation of Broadcasting (1978), at 324-25.

[2] Thus, NBMC has favored application of the Fairness Doctrine to broadcasting. See Red Lion Broadcasting Corp. v. FCC, 395 U.S. 367 (1969).

While individuals do not have a right of access to speak over broadcast stations, CBS v. Democratic National Committee, 412 U.S. 94 (1973), audiences do have a right "to receive suitable access to social, political, esthetic, moral, and other ideas and experiences. . . ." Red Lion, supra note 2, 395 U.S. at 390. It is this paramount interest of the audience which we assert here is served by declaring Section 399's ban on editorializing unconstitutional.

The voices of noncommercial educational stations subject to the censorship of Section 399 could contribute in several ways to the public's right to diverse information sources.

First, any additional voice presents the greater likelihood of new information entering the marketplace of ideas. As the number of stations increase, one (or more) of the stations -- whether a

noncommercial station or a commercial one in the same market -- is more likely to address minority problems or issues. Fifty-one voices are better than fifty.

Second, noncommercial stations are not subject to pressures from advertisers, actual or perceived, not to cover certain controversies.[3/] As the Carnegie Commission on the Future of Public Broadcasting recognized in its report, A Public Trust (1979), at 25, ". . . public broadcasting creates programs to serve the needs of audiences, not to sell products or to meet the demands of the marketplace. This ideal demands that public television and radio attract viewers and listeners whose tastes and

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3/ See, e.g., Fang & Whelan, Survey of Television Editorials and Ombudsman Segments, 17 J. Broadcasting 363, 367 (1973) (many stations avoid editorials so as not to offend advertisers); Quaal & Brown, Broadcast Management (1976), at 356.

interests are significant, but neglected or overlooked by media requiring mass audiences." Noncommercial stations can thus be expected to provide different and additional viewpoints on some subjects from those stations subject to commercial pressures.[4/]

Third, if the purpose of educational broadcasting is to educate and inform, then responsible editorializing, subject to the Fairness Doctrine, can be an

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[4/] To a certain extent minorities are further disserved by the commercial broadcast system than most other components of the general audience. In commercial broadcasting, audiences are the product sold by the thousands to advertisers, who are the consumers (of audiences supplied by the broadcaster). Advertisers look for audiences that are affluent and likely to buy their products. The poor, minority, elderly or rural audiences are often demographically undesirable. Thus broadcasters are not anxious to serve such audiences, since to do so lessens the attractiveness of their product to advertisers. See generally Brown, Television -- The Business Behind the Box (1971).

important addition to a station's overall educational fare.

Fourth, editorializing raises new issues to the public agenda. It spotlights issues which might otherwise be ignored by the general public. In this way it is an important supplement to the Fairness Doctrine, which (with but one case exception)[5/] provides only for programs to balance issues already raised. Red Lion, supra note 2, 395 U.S. at 369. In fact, the Fairness Doctrine, from the beginning, has been premised on a broadcaster's ability to editorialize. Report on Editorializing by Broadcast

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5/ In Patsy Mink (WHAR), 59 F.C.C.2d 987 (1976), the Commission sanctioned a station for its failure to cover a "burning issue" initially. This is the only instance of the FCC's enforcing the affirmative part of the doctrine to cover controversial issues. See generally Kurnit, Enforcing the Obligation to Present Controversial Issues: The Forgotten Half of the Fairness Doctrine, 10 Harvard Civ. Rts. Civ. Lib. L. Rev. 137 (1975).

Licensees, 13 F.C.C. 1246 (1949).[6/]

In addition, as the Commission has deregulated in radio, and is proceeding to do so in television, it has discarded its "ascertainment" procedures. See Office of Communication of the United Church of Christ v. FCC, 707 F.2d 1413, 1419, 1435 (D.C. Cir. 1983). This process required licensees to ascertain local needs and problems and to program responsively to those issues. These procedures generally helped in the airing of issues of particular concern to minorities -- many of which would likely have been ignored otherwise. As these procedures are abolished, it is more important for audiences to have access to as many

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6/ In WHDH, 16 F.C.C.2d 1, aff'd sub nom. Greater Boston Broadcasting Co. v. FCC, 444 F.2d 841 (D.C. Cir. 1970), cert. denied, 403 U.S. 923 (1971), the Commission placed a slight demerit on the incumbent licensee in a comparative hearing for its failure to editorialize.

different voices as possible, in the hope that minority issues, needs and problems will be addressed at least by some.

Finally, the relatively few minority-controlled noncommercial broadcast stations are extremely important voices in minority communities. Blacks, Hispanics, Asians, and American Indians, who comprise approximately 20% of the United States population, control fewer than 2% of the nation's broadcast outlets.[7/] Approximately 13% of those very few stations are noncommercial. Thus, while any denial of editorial voices is significant to minorities, the denial of 13% of the minority-controlled voices is even more significant, in view of their disproportionately few outlets nationwide.

7/ See, e.g., Honig, "Relationships Among EEO, Program Service and Minority Ownership in Broadcast Regulation," in Gandy, ed., Proceedings from the Tenth Annual Telecommunications Policy Research Conference (1983).

In sum, NBMC urges the Court to consider strongly the listeners' interests in maximizing diverse voices in the necessarily limited scheme of broadcast regulation. As we have shown, the First Amendment interests of minority audiences are particularly affected by Section 399. Additional voices are needed in the marketplace, and we believe that stations subject to the ban of 399 are more likely than not to raise issues of import and concern to minority audiences.

We turn now to an analysis of these various concerns and interests in applying the First Amendment to the statute in issue in this case.

B. Congress' Suppression of the Editorial Voices of Certain Broadcasting Stations Is Unnecessary to Achieve a Compelling Governmental Interest.

This Court repeatedly has emphasized that in order to interfere with the exercise of a fundamental right, the Government must demonstrate a compelling state interest and a narrowly-tailored restriction designed to protect that interest.[8/] As we show below, the interest asserted to justify the Government's editorial ban is (1) vague and speculative, (2) outweighed by other, strongly-accepted governmental interests in the broadcasting field, and (3) both

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8/ See Consolidated Edison Co. v. Public Service Commission, 447 U.S. 530 (1980); First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978); Community-Service Broadcasting of Mid-America v. FCC, 593 F.2d 1102 (D.C. Cir. 1978) (en banc).

underinclusive and overly broad in trying to achieve the professed interest.

1. The Government's Interest in Banning Certain Editorializing Is Uncompelling.

The stated Congressional interest in enacting Section 399 was to prevent noncommercial broadcasting stations from becoming "mouthpieces" for the Government. This is dubious, however, in light of the legislative history showing Congressional fear of opposition to incumbents.[9/] In addition, the professed goal is overly vague. What constitutes the

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9/ The House debate on the 1967 Public Broadcasting Act focused on some Congressmembers' fears that editorials might harm them politically. As one example, Representative McClure worried that if noncommercial broadcasters were given the right to editorialize, they might be "crusad[ing] for [his] opponent in next year's election." 113 Cong. Rec. 26391 (1967).

Government? Is it the President? If so, there appears to be no possibility of undue influence as the President does not disburse CPB funds. Is Congress "the Government"? Again, there is no danger as Congress is a diverse group unlikely to hold a single opinion on any controversial issue.

Even if the ambiguous Congressional motive is accepted, it is pure speculation whether noncommercial broadcasting stations will become Government mouthpieces. The lower court correctly deduced that this fear is unjustified.[10/] Section 399 is aimed at hundreds of diverse stations that will not agree on all issues. As we explain above, NBMC is more concerned that the ban stifles important discussion than

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10/ League of Women Voters of California v. FCC, 347 F.Supp. 370, 385 (C.D. Cal. 1982) (J.S. App. at 14a-15a).

that there may be some purely hypothetical chance that a broadcaster will become a mouthpiece for the Government. The ground is simply uncompelling.

2. The Governmental Interest Asserted Is Outweighed by Other, Overriding Interests in Promoting a Marketplace of Ideas.

The purpose of the First Amendment is to "preserve an uninhibited marketplace of ideas. . . ."[11/] In a free society, there is a strong governmental interest in enhancing speech, yet Section 399 strikes down the number of voices that

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11/ Red Lion Broadcasting Co. v. FCC, supra, 395 U.S. at 390 (1969). In FCC v. Nat'l Citizens Committee for Broadcasting, 436 U.S. 775, 801-02 (1978), the Court recognized "diversity of information heard by the public without ongoing government surveillance of the content of speech" as a legitimate "governmental interest" in First Amendment analysis.

can be heard over the airwaves. The American public relies on broadcasting stations for access to ideas and information. Yet by prohibiting hundreds of diverse noncommercial stations from editorializing, Section 399 significantly limits the viewpoints to which the public is exposed. As explained in Section A above, this limitation works particularly to the detriment of minority audiences who most need First Amendment protection.

Furthermore, because the penalties are so severe for violation of the editorializing ban of the Communications Act -- including nonrenewal or revocation of license under 47 U.S.C. §§ 309, 312, or a significant jail term and fine under 47 U.S.C. § 501 -- this statute may chill other, non-editorial speech. Broadcasters may fear to express themselves or may misunderstand what technically constitutes "editorializing." Again, the

listener's interest and the governmental interest in free flow of information is defeated by the statute.

3. The Statute Is Neither Narrowly Tailored to Meet Its Objective, Nor Is It Reasonably Effective in Preventing the Perceived Harm.

Where First Amendment rights are involved, the means created to achieve a conflicting governmental goal must be precisely tailored.[12/] Since Section 399 does not achieve its purposes, despite its severe restraints on editorial discretion, it cannot meet this "narrowly tailored" test.

(a) If noncommercial broadcasting licensees agree with Congressional or

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12/ Nebraska Press Association v. Stuart, 427 U.S. 539 (1976).

Presidential stands on particular issues, they (like their print media colleagues) should have the right to express that agreement. Opposing opinions are guaranteed presentation through the Fairness Doctrine. Section 399 is unnecessary to ensure that the public hears ideas and positions opposing the Government.

(b) Furthermore, by censoring only overt editorials, in which the licensees truthfully state their partisanship, Section 399 will not succeed in eliminating all editorial comment by noncommercial stations subject to the ban.

Section 399 applies only to editorializing by noncommercial stations -- not to other types of programming. Indeed, the Government admits that Congress does not want to restrict controversial or political programs. (FCC Br. at 41.)

Yet the FCC has noted that editorial expressions occur in a variety of forms,

> ranging from the overt statement of position by the licensee in person or by his acknowledged spokesmen to the selection and presentation of news editors and commentators sharing the licensee's general opinions or the making available of the licensee's facilities, either free of charge or for a fee to persons or organizations reflecting the licensee's viewpoint either generally or with respect to specific issues. 13/

Obviously, it is preferable that a licensee's personal opinion clearly be stated as such than that it appear more subtly as part of regular programming. As the FCC has emphasized, "the [p]ublic has less to fear from the open partisan than from the covert propagandist."14/

(c) The Government asserts that Section 399 is not overly-restrictive as

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13/ Report on Editorializing by Broadcast Licensees, 13 F.C.C. 1246, 1252 (1949).

14/ Id., 13 F.C.C. at 1254.

it permits station employees, academics, experts and others to express the station's opinion. (FCC Br. at 41.) But, as Justice Blackmun correctly noted in his concurrence in Regan v. Taxation With Representation,[15] "it hardly answers one person's objection to a restriction on his speech that another person, outside his control, may speak for him."[16] The public is best served when arguments are presented by those "who actually believe them; who defend them in earnest, and do their very utmost for them."[17]

(d) Finally, if the true governmental goal is to prevent broadcasting stations that receive governmental aid from

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[15] Regan v. Taxation With Representation of Washington, 51 U.S.L.W. 4583 (May 23, 1983).

[16] Id., U.S.L.W. at 4587.

[17] J. Mill, On Liberty 32, cited with approval in Red Lion, supra note 2, 395 U.S. at 392 n.18.

becoming propaganda tools, there is no justification for applying the ban only to noncommercial stations. Commercial stations are dependent upon the government for their very valuable licenses. These free licenses can be worth over $200 million, and are negative governmental subsidies to those who receive them.[18/] Because broadcast licenses are not automatically renewed, the potential loss of a valuable broadcasting license is a much greater threat to create governmental mouthpieces than limited government funding of public broadcasters. Yet there has been no adequate explanation as to why the Government has singled out noncommercial licensees for the editorial ban.

18/ See, e.g., Gottfried v. FCC, 655 F.2d 297, 312 n.55 (D.C. Cir. 1981), rev'd on other grounds sub nom. Community Television of Southern California v. Gottfried, ___ U.S. ___, 103 S.Ct. 885 (1983).

4. There Are Less Restrictive Means to Accommplish the Government's Professed Goal.

Although the current safeguards outside Section 399 fully protect noncommercial broadcasters from government influence,[19/] alternative restrictions are available that will not interfere with the First Amendment.

a. Segregation of funds.

Congress might require that no governmental funds be used to produce editorials. Noncommercial broadcast stations currently are required to

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19/ E.g., the Corporation for Public Broadcasting (CPB), an independent, nonprofit corporation responsible for disbursing funds to noncommercial stations, is sufficiently insulated from political concerns. CPB board members are appointed by the President, with the advice and consent of the U.S. Senate for six-year terms, and with other safeguards to guard against governmental influence. 47 U.S.C. §§ 396(c) and (f).

maintain certain records and undergo annual audits, so this suggestion is easily implemented. Just as the Court in Regan v. Taxation With Representation suggested that TWR could establish two separate corporations,[20/] noncommercial broadcasters could establish two separate accounts -- one for general operations and another for producing and presenting editorials. This solution is further supported by the Court's discussion in Consolidated Edison v. Public Service Commission, 447 U.S. 530 (1980). In that case, the Court ruled that the Commission could not prohibit public utilities from including controversial inserts in their billing envelopes. The Court suggested that the utility company could allocate the costs of producing the controversial

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20/ Regan, supra note 15, 51 U.S.L.W. at 4584.

inserts to its shareholders so that the ratepayers would not be subsidizing the speech.[21]

b. Content-neutral criteria for funding.

Another narrowly-tailored means to achieve Congress' goal is to mandate purely objective standards for the CPB to follow in disbursing funds. Although this already appears to be the case, Congress could further specify that no funding decisions shall be determined in any way by how an applicant editorialized on any issue. In that way, stations would have no incentive to use their editorials to curry favor.

Indeed, independence from governmental domination is a requirement for FCC

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[21] Consolidated Edison, supra note 8, 447 U.S. at 543.

license renewal. As explained in Citzens Communications Center v. F.C.C.,

> the failure to promote the full exercise of First Amendment freedoms through the broadcast medium may be a consideration against license renewal. Unlike totalitarian regimes, in a free country there can be no authorized voice of government. Though dependent on government for its license, independence is perhaps the most important asset of the renewal applicant. 22/

In sum, Section 399 does not meet the stated government goal. Instead, it violates the First Amendment by limiting the public's right to receive valuable and needed information. There is no justification for treating noncommercial stations that accept funds from the insulated CPB differently from commercial stations that are dependent upon the government for their valuable licenses.

22/ Citizens Communications Center v. FCC, 447 F.2d 1201, 1214 (D.C. Cir. 1971).

As the court succinctly stated in Community-Service Broadcasting of Mid-America, Inc. v. FCC, 593 F.2d 1102, 1110 (D.C. Cir. 1978) (en banc): "Clearly the existence of public support does not render the licensees vulnerable to interference by the federal government without regard to or restraint by the First Amendment. . . ."

The statute is not narrowly tailored to achieve its purpose and its ends are not compelling under all the circumstances and safeguards inherent in public broadcasting.

II. IN CONSTRUING SECTION 399, THE COURT NEED NOT ADDRESS OR RULE ON OTHER PROVISIONS OF THE COMMUNICATIONS ACT WHICH PLACE OBLIGATIONS ON NONCOMMERCIAL STATIONS.

The statute at issue in this case is aimed specifically at suppressing the editorial voices of noncommercial broadcasters. It thus must undergo the strictest form of scrutiny from the courts and require a most compelling justification. As we set forth above, the statute is unconstitutional.

In contrast, however, are the provisions of the Act which require noncommercial broadcasters to adopt procedures designed to encourage affirmative action in employment and for community involvement, 47 U.S.C. §§ 398(b)(1) and 396(k)(9)(A) (1982 Supp.). These provisions are not directly suppressive of the broadcasters' speech; indeed, where there

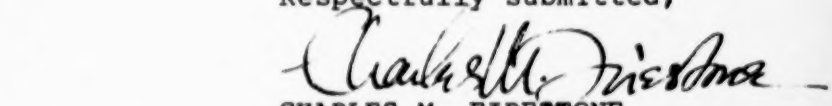
is any relationship to programming at all, they are designed to enhance the free speech rights of the public.

Certainly these provisions are not in issue in this case, and therefore are not before the Court. Nevertheless, NBMC respectfully draws the Court's attention to them in the hope that, in affirming the lower court, this Court does not sweep too broadly. Provisions in the Communications Act prescribing duties for broadcasters do not contravene the First Amendment where they are not direct bans on certain voices or specific content.

CONCLUSION

For the foregoing reasons, Amicus Curiae National Black Media Coalition respectfully urges the Court to affirm the court below.

Respectfully submitted,



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* For identification purposes only. This brief is not intended to reflect the position of the Regents, University of California.